IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-5549

MICHAEL TAYLOR,
PETITIONER

V.

COMMONWEALTH OF KENTUCKY,
RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, Michael Taylor, has in his petition requested that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on July 11, 1977.

The petitioner was indicted, (Indictment No. 7844), and tried in the Franklin Circuit Court, Franklin County, Kentucky, on the charge of second degree robbery in violation of KRS 515.030. He was found guilty by the trial jury which fixed his punishment at five years in the penitentiary. (Transcript of Evidence, hereinafter designated as TE pp.7,8).

The opinion of the Court of Appeals of Kentucky affirming petitioner's conviction was filed on April 1, 1977 and is reported as Taylor v. Commonwealth, Ky., App. 551 S.W. 2d 813 (1977). The order of the Supreme Court of Kentucky denying discretionary review in petitioner's case was entered on June 29, 1977. The mandate in petitioner's case was entered by the Court of Appeals of Kentucky on July 11, 1977. Copies of the above-mentioned opinion, order and mandate are attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was entered on April 1, 1977. Petitioner's motion for discretionary review in the Supreme Court of Kentucky was denied on June 29, 1977. The mandate of the Court of Appeals of Kentucky was issued in petitioner's case on July 11, 1977. Petitioner states the jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED BY PETITIONER

I.

WHETHER PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF HIS RIGHT TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE PRESUMPTION OF INNOCENCE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION?

II.

WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE REFUSAL OF THE TRIAL COURT TO GIVE AN INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE WHEN PETITIONER'S COUNSEL REQUESTED AND TENDERED SUCH AN INSTRUCTION?

CONSTITUTIONAL QUESTION INVOLVED

Petitioner alleges the constitutional provision involved is the 14th Amendment to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

Petitioner, Michael Taylor, was tried in the Circuit Court of Franklin County in Frankfort, Kentucky on the charge of second degree robbery in violation of Kentucky Revised Statute (KRS) 515.030. Contrary to his plea, petitioner was convicted by a jury of the charged offense and sentenced to five years confinement in the penitentiary. Final judgment was entered against petitioner on June 22, 1976. Notice of appeal was filed on June 24, 1976.

On April 1, 1977 the Kentucky Court of Appeals in a published opinion, with one judge dissenting, affirmed the conviction in petitioner's case, but remanded the case to the trial court for a resentencing due to the trial judge's failure to order the statutorily mandatory presentencing investigation. The trial judge had ordered, received and had the report in his office in his desk at the time petitioner was first sentenced but the court order book did not state this fact. Hence, the case was remanded back to the circuit court where the petitioner was resentenced in conformity with the Court of Appeals' order and opinion.

Petitioner's timely motion for discretionary review was overruled by the Supreme Court of Kentucky on June 29, 1977. Consequently, the Court of Appeals of Kentucky on July 11, 1977 issued the mandate in petitioner's case.

In March of 1976, petitioner was indicted in the Franklin Circuit Court by Indictment No. 7844, for the offense of second degree robbery in violation of KRS 515.030 (Transcript of Record hereinafter designated TR p.3; TE p.14). According to the

indictment, petitioner on or about February 16, 1976, committed second degree robbery "when, in the course of committing theft, he used physical force upon James Maddox" and "unlawfully took from Mr. Maddox a wallet containing ten ($10) to fifteen ($15) dollars and his house key." (TR p.3).

James Maddox, the robbery victim lived at 349 Rosewood Drive, Frankfort, in Franklin County, Kentucky, on the 16th of February, 1976, the day the robbery occurred. He had lived at the address 16 or 17 years (TE p.17). Mr. Maddox was "going on fifty-one years of age and had been employed at the George Taylor Liquor Store on Broadway for about ten or twelve years" (TE p.17). He grossed about eighty dollars a week as salary and had known Michael Taylor "about fifteen years"(TE p.17). However, over the years Taylor had never been over to the Maddox house but about three times before February 16, 1976. (TE p.18).

It was about 8:15 p.m. the night of February 16, 1976 when Michael Taylor, age 20 years, came to James Maddox's home and knocked on the door. (TE p.18). Maddox opened the door and Michael Taylor said, "let us in." (TE p.18). Maddox informed Taylor that he had "to go to bed" since he had "to get up early the next morning" and "go back to work," the next morning. (TE p.18). Taylor said, "okay and he and a companion left." (TE p.18).

Taylor and his companion came back about fifteen minutes later and knocked on the door again and Taylor said, "you ain't going to bed" and they "pushed their way in" when Maddox opened the door (TE pp.18,19). Maddox again told them he had to go to bed and ordered them "to get out of his house" and threatened to call the police. (TE p.19). As Maddox stepped out of the door Taylor's companion "jumped on Maddox's back and Mike Taylor

hit him in the side of the head." (TE pp. 19-20). Petitioner wrestled Maddox to the ground and then wrestled for and with Maddox's pocketbook and got the pocketbook out and then got Maddox's key and broke off running. (TE p.19). Maddox identified Taylor in the Courtroom and stated that there was between ten and fifteen dollars in the wallet that was taken, also other papers, a bus ticket, rent receipt and social security card. (TE pp.19-20). None of the items taken were ever returned to Maddox (TE p.20).

Maddox's work at the liquor store consisted of selling beer and whiskey and bartending (TE p.22). James Maddox the robbery victim was the only witness called by the Commonwealth. He was positive that Mike Taylor got him down and took his wallet (TE pp.24-25). Maddox subsequently took out a warrant against Taylor (TE p.20).

Michael "Mike" Wayne Taylor, age 20, denied robbing James Maddox in his testimony (TE pp.26-35). He did however, admit that he had been at Maddox's home but denied being there on February 16, 1976. Petitioner-Taylor admitted that most of Maddox testimony was true but denied that he robbed Maddox. (TE pp.34-35). Taylor was the only witness to testify in his behalf.

Petitioner testified that he had not committed the acts which Mr. Maddox had related on the witness stand (TE p.27). Furthermore, petitioner asserted that he had never struck Mr. Maddox. (TE p.27).

Petitioner testified that he had known Mr. Maddox "about three or four years" and had been to his house "several times." (TE p.27).

Petitioner, the only defense witness, explained that he was twenty years of age and that he resided with his mother and stepfather in Frankfort (TE p.26). He was employed at George's restaurant and had been for six years. (TE pp.25-26).

After the robbery occurred, Mr. Maddox immediately called the police and reported the offense. The prosecutor elicited from Mr. Maddox that he had subsequently taken out a warrant against the petitioner and "appeared before the Franklin County Grand Jury to seek an indictment." (TE p.20).

At the conclusion of the direct examination, Mr. Maddox explained that he did not know the other person who was with petitioner on the night in question (TE p.21). The witness-victim had never seen the other person before and had seen him but one time since.

After the Maddox testimony was completed, the defense rested (TE p.36). Petitioner's counsel then made his motion for a directed verdict, but was overruled. (TE p.36).

During an in-chambers hearing on the instructions, petitioner objected to the trial court's failure to give the jury the instructions tendered by the defense (TE p.36). Petitioner's counsel requested instructions, including instructions on the presumption of innocense, Question I presented herein, (Defense Instruction No.4) and on the indictment's lack of evidentiary value, Question 2 presented herein, (Defense Instruction No.5). Parenthetically, it should be noted that these instructions are contained as appendices to the transcript of evidence (TE p.49). During the in camera hearing on instructions, petitioner's counsel obtained leave of the court to dictate into the record at the conclusion of the trial the defense's formal objection pertinent to the instructions (TE pp.36-37).

ARGUMENT

I.

THE COURT BELOW DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY APPELLANT DUE PROCESS OF LAW BY REFUSING TO GIVE THE DEFENSE REQUESTED INSTRUCTION ON THE PRESUMPTION OF INNOCENCE.

After the jury was selected in the instant case, the Commonwealth's Attorney, Honorable Ray Corns, presented his opening statement and he concluded by reading the indictments to the jury (TE pp.13-14). It was the Court that directed Mr. Corns to read the indictment.

In Kentucky the Court generally has the clerk of the court read the indictment to enlighten the select jury as to the charge that is to be heard by the jury. The record does not disclose whether or not the clerk was present when the indictment was read.

It is generally well understood in Kentucky that an indictment is merely a piece of paper upon which is typed a stated law violation of which the accused may or may not be guilty.

The jurors were or are well aware that it was or is their responsibility to determine whether or not the accused is guilty or innocent of the typed charge in the defendant's case.

In the case of Baker v. Commonwealth, Ky. App. 134 S.W. 2d 997, at page 999, (1940) the Court determined that where the usual instruction on reasonable doubt was given, that the accused was presumed to be innocent of every charge named in the indictment until his guilt had been established by the evidence beyond a reasonable doubt, should have been omitted. Also, in Johnson v. Commonwealth, Ky.App. 181 S.W. 2d 262,263, 297 Ky. 760 (1944) the Court said:

> "The final contention is that error was committed in failing to instruct that the law presumes the defendant innocent until his guilt has been proven beyond a reasonable doubt. In Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463, we held that the usual instruction on reasonable doubt was sufficient and that an instruction of this character is not required. The usual reasonable doubt instruction was given."

The appellant's counsel from the very beginning of the voir dire examination of the jurors in the case to the conclusion of the court's presentation of the instructions and the return of the jury's verdict repeatedly stressed that the presumption of innocence continued to follow the appellant throughout the proceedings and at no time did the prosecutor contend otherwise. Appellant's counsel tendered the four instructions appearing on unnumbered pages 51-54 inclusive of the Transcript of Evidence. Appellant's tendered instruction No.4 dealt specifically with the "presumption of innovence" and "reasonable doubt."

The court's instructions No.1 and 2 both stressed that in order to find the defendant guilty of the offense charged that the jury must believe the defendant guilty beyond a reasonable doubt and court instruction No.2 defines reasonable doubt.(TE p.37).

The appellant admits in his Brief that in the past the Kentucky Court of Appeals in the following case decisions approved the circuit court refusal to give a specific instruction on presumption of innocence in addition to its instructions on reasonable doubt. The case decisions upholding the court of a specific presumption of innocence instruction refusal are: Brown v Commonwealth, 198 Ky.663, 249 S.W. 777 (1923), and Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463 (1929). In Baker v. Commonwealth, 281 Ky. 45, 134 S.W. 2d 997 (1939), the Kentucky appellate court reasoned that a presumption of innocence instruction was not proper because the trial court had instructed on reasonable doubt.

The trial jury in the case at bar did not lack for sufficient knowlege that the presumption of innocence continued with the accused on trial until it was over come by the evidence presented in court. The matter was brought up during the voir dire examination of the prospective jurors by appellant's counsel. The following examination in the voir dire proceedings appear on Pages 9 and 10 of the Franklin Circuit Court's Transcript of Evidence:

> "Have any of you heard or know anything about this particular case? Have any of you ever had occasion or the necessity to take out a warrant or to institute criminal proceedings before? I take it by your silence that you haven't. I'm sure you all agree to this final question as regards the principle of innocence or reasonable doubt. Do each of you all agree and understand that Mike Taylor as he sits there today is a young man who is presumed to be innocent of the charge of second degree robbery, that this innocence has to be overcome by the Commonwealth to meet a standard of what we call beyond a reasonable doubt and that to return a verdict of not guilty. Do each of you understand the principle of innocence the requirement of reasonable doubt? That reasonable doubt must be removed in order to fina a verdict of guilty? Do each of you understand that principle and I try to make it as elementary as I can. Lawyers sometimes have a tendency to make things complicated but I hope I make it sufficiently clear." (TE p.9).
>
> I take it by your silence that each of you does understand. Thank you." (TE p.10).

THE COURT:

Take your list.

MR. CORNS: Commonwealth takes the jury, Your Honor.

THE COURT: Take your list, Mr. Judy.

MR. JUDY: Thank you, Your Honor. We'd like to deliberate for just a moment if we could.

THE SHERIFF: Gus Smith, Christine Noblitt are excused.

THE COURT: Call two more jurors.

(Whereupon, Mr. William Sanders and Nancy Forsee were sworn by the Court).

MR. CORNS: These questions will be directed to the last two members that have just joined the panel.

Have you eard (sic) the questions I asked previously?

MR. SANDERS: Yes, sir.

MS. FORSEE: Yes, sir.

MR. CORNS: Having heard those questions do you know of any reason why either of you could not serve or should not serve as a juror? Mr. Judy, when he talked to the jurors, advised that each defendant is presumed innocent until proven guilty beyond a reasonable doubt. If you serve in this case will you follow that rule of law? If, however, the Commonwealth does prove to your satisfaction beyond a reasonable doubt that this defendant did commit the crime with which he's charged, will you return a verdict of guilty? Do you know of any reason why, if you return a verdict of guilty, you could not fix his punishment between five and ten years in prison for second degree robbery? If both of you serve will you give both the prosecution and the defense a fair trial? Commonwealth passes, Your Honor.

MR. JUDY: May it please the Court, Mr. Corns. I also direct my attention to the last two who came on. You all were sitting in the back. Could you hear the questions that I generally asked? Was there any question that I asked that you might have registered a reply in your mind that you would have answered if you had been sitting on the panel at that time? Do either of you know socially or have you been represented by Mr. Corns or Mr. Prewitt? Have either of you had the opportunity to take out a warrant initiating an action in court? Do both of you subscribe to the principle of law and the Judge will instruct you that the defendant is presumed innocent until proven guilty with sufficient proof to prove beyond a reasonable doubt for you to return a verdict of guilty? Do both of recognize that it is equally a part of your duty as a juror to return a verdict of not guilty if you believe or have reasonable doubt

and that your duty is just as well served in returning a verdict of not guilty if you so believe as a guilty verdict if you believe he's guilty beyond a reasonable doubt? Thank You.

THE COURT: Take your licks, Mr. Corns.

MR. CORNS: Commonwealth takes the jury, Your Honor.

THE COURT: Commonwealth accepts the jury.

MR. JUDY: Defendant accepts the jury, Your Honor.

The foregoing examination was heard by all accepted jurors. Hence, it is apparent from the foregoing pages of the transcript of evidence that the prospective and accepted jurors were informed and interrogated more in the voir dire examination on the presumption of innovence and reasonable doubt than on anything else. The trial jury was most adequately informed and enlightened on the presumption of innocence by the voir dire interrogation, by Mr. Judy, counsel for the appellant and also by Mr. Ray Corns, counsel for the Commonwealth. The court was no doubt cognizant of this fact when it refused to give Instruction No. 4 tendered by the so-called "clean slate" presumption of innocence instruction tendered by appellant's counsel. (TE p.54).

The court's refusal was not (1) an error on the court's part, and (2) if it had been or was error on the part of the court for the reasons, facts and in the setting set forth above it was harmless error.

Any form of specific presumption of innocence instruction by the court would have meant that the jury was being instructed on a presumption, or, on that which was already well known from their voir dire examination. The appellant certainly did not stand trial before a jury which was uninformed or lacking in knowledge as to the constant applicability of the presumption of innocence until the accused was proven "guilty" beyond a reasonable doubt.

The Instruction No. 4 submitted to the court for presentation to the jury is in part an argumentative self servi statement and a quasi testimonial for the accused as to appella alleged or claimed clean slate in that it attempts to limit or the jury what is to be considered in arriving at its findings o fact and verdict. In Kentucky only felony convictions are admissible in evidence in attacking the witnesses' credibility. The term "clean slate" would have inferred a clean record as to felonies and misdemeanors.

In view of the testimony transcript of the record the appellant received a fair trial within the meaning of the Fourt Amendment and within the ruling of W.J. Estelle, Jr., v. Harry Lee Williams, 48 L.Ed. 126, 96 S.Ct. (No. 740676) argued Octobe 1975, Decided May 3, 1976 and cited by the appellant. The Este supra case turned on the question of compelling the accused defendant to wear identifiable prison clothing at his trial in it was held that the accused was denied equal protection of the laws, etc. The defendant Estelle, Jr. voiced his objection to the jailer before he was taken to the courtroom. The Estelle case is not controlling in the Michael Taylor case. In the givi of instructions the trial court must consider each case and issu in its own factual context as revealed by the evidence and trial record.

In Mink v. Commonwealth, Ky., 15 S.W. 2d 463, 464 [4] (it was stated:

> "It is also suggested that the trial court should have instructed the jury that the defendant was presumed to be innocent until his guilt was shown beyond a reasonable doubt. The usual instruction on reasonable doubt, substantially following the language of

> Section 238 of the Criminal Code, was given, and that was all to which the defendant was entitled. An instruction as to reasonable doubt in substantially the form contended for by appellant was critized in Brown v. Commonwealth, 198 Ky. 663, 249 S.W. 779, and it was there said that the court should not tell the jury that the law presumes the innocence of a defendant, but the instruction should always follow, in substance, the language of the Code. Judgment affirmed."

Also see Johnson v. Commonwealth, Ky., 181 S.W. 2d 262, 297 Ky. 760 (1944); Goodwin v. Commonwealth, Ky., 283 S.W. 420, 214 Ky. 422; Ky.C.L. Key 778 (3)(4); Swango v. Commonwealth, Ky., 165 S.W. 2d 182, 291 Ky. 960 (1942).

Certainly the court's refusal to give tendered instruction No.4 was not an error of constitutional dimension. There was indeed both legal and logical justification for the trial judge's refusing to give tendered instruction No.4.

Appellant's main argument is that such an instruction under the law in some federal courts and other state courts are required under different circumstances. This is true of Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 381 (1895) in which the facts and voir dire differ. In Coffin, supra the court stated that the burden of proof had shifed during the course of the trial and that it had become incumbent on the accused to show the lawfulness of their acts. The case is not controlling and applicable to the instant case.

The case of Cockran v. U.S., 157 U.S. 286, 15 S.Ct. 628, 39 L.Ed.704 (1895) was a bank case prosecuted under U.S. Rev. Stat. §5209 which dealt with the making of false entrys, etc. in which the instructions to a jury under the evidence might be expected in the

factual situation to demand a presumption of innocence instruction. Hence, the case is not applicably controlling in this case of Michael Taylor.

The case of Enoch W. Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897) also dealt with the testimony of a bank cashier in which both the facts and jurisdiction differed from those applicable to those of the instant case.

In Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1 910) a murder case was dealt with in which the Circuit Court of the United States for the Western District of Washington the judgment was affirmed.

The plaintiff alleged that the remarks of counsel amounted to prejudicial error; wrongfully obtained evidence; sufficiency of allegations of place within exclusive federal jurisdiction, as well as instructions, etc.

The case stated that the jurors should decide controversies as they would any important question in their own affairs is good as against a general exception, etc. See Page 1022, headnote #14 pp.1026-1030.

Appellant on page 10 of his brief presents a quotation from United States v. Thaxton, 483 F. 2d 1071, 1073, the two-fold function which the presumption of innocence performs in our criminal process. However, the appellant's brief fails to mention that the Thaxton case at page 1073 states:

> "Mere failure to instruct by use of the customary formula does not constitute reversible error unless the charge given fails to inform the jury of the purpose and functions of the presumption."

The Thaxton case further states at page 1073 that:

> "Although the presumption is one of the strongest rebuttable presumptions known to law, it does not constitute evidence in favor of the accused and it disappears when a verdict of guilty, supported by substantial evidence, is returned against the defendant."

Respondent submits that the court's Instruction No.1, No.2 and No.3 appearing on pages 37 and 38 of the Transcript of Evidence instructing the jury as to reasonable doubt were sufficient. (TE pp.37-38).

The interrogation of the prospective jurors by petitioner's counsel and the prosecutor appearing on pages 10-12 inclusive leaves no doubt but what the trial jury was adequately informed as to presumption of innocence and the doctrine of reasonable doubt.

II.

THE COURT BELOW DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY APPELLANT DUE PROCESS OF LAW BY REFUSING TO GIVE THE DEFENSE REQUESTED INSTRUCTION ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE.

Following the swearing of the jury, the trial judge in speaking to the Commonwealth's Attorney said: "Mr. Corns, you may read the indictment and state your case." (TE p.12). At the conclusion of his statement the prosecutor merely read the indictment. (TE p.14).

It is true the court instructed the prosecutor to read the indictment and state his case. The prosecutor stated his case and then read the indictment. It would no doubt have been better had the indictment been read first and the statement read last.

The trial court in the case sub judice followed the law in this Commonwealth of Kentucky and there certainly wasn't any effort to obscure truth. The petitioner had a fair trial and

received the minimum five year sentence. The cases relied upon in petitioner's brief are almost entirely federal cases rather than Commonwealth cases. The petitioner was not denied due process by a failure to stress the presumption of innocence. The jury panel was interrogated about this in the voir dire examination. The interrogation of the jurors plus the reasonable doubt instruction left no doubt as to the trial jury being most adequately informed as to the presumption of innocence and their duties concerning it.

Unlike those things mentioned in Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972); Cupp v. Naughton, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed. 2d 368 (1973) there is nothing in the record, or transcript of evidence in the case sub judice which "conflicts with", "impunges upon","dilutes" , or "negates the presumption of innocence." To the contrary there are repeated questions and answers in the transcript of evidence which repeatedly stress and imbue in the minds of the selected jurors the imperative importance to the petitioner of the doctrine of the "presumption of innocence." The jurors themselves had been adequately interrogated on its importance to the accused petitioner in the process of being selected as jurors. The very beginning of the trial was devoted to ascertaining whether or not the prospective jurors had a proper appreciation of the presumption of innocence.

Petitioner has complained that the reading of the indictment by the Commonwealth's Attorney after the attorney had made his opening statement was reversible error.

It was purely a matter of context in presenting the indictment and the Commonwealth's opening statement for the trial jury's information and consideration.

Appellant in his brief states:

> "Later, during the prosecutor's questioning of James Maddox, the alleged robbery victim, the following colloquy occurred.

Q.35 Did you subsequently take out a warrant against Mike Taylor?

A. Yeah.

Q.36 And then you later appeared before the Franklin County Grand Jury to seek an indictment?

A. Yes, Sir.

By informing the jury that Mr. Maddox, the prosecution's only witness, had appeared before the Franklin County Grand Jury to seek an indictment, the prosecution was able to convey to the jurors that the indictment of appellant was an explicit affirmation by the grand jury of the veracity of Mr. Maddox's allegation that appellant robbed him.

In view of the paucity of evidence against appellant and the prosecutor's calculated emphasis of the grand jury's decision to indict appellant on the basis of Mr. Maddox's testimony, appellant's counsel requested the trial judge to give the following instruction." (TE p.20-21; 36). [Emphasis added].

Petitioner has belatedly objected to the history and a part of the record in the instant case being introduced in open court.

The petitioner's contention that since Mr.Maddox was the only prosecution witness to appear before the grand jury conveyed to the jurors that the indictment of petitioner was an explicit affirmation by the grand jury of the veracity of Mr. Maddox is a far-out, far-fetched conclusion totally devoid of merit. The jury knew that an indictment was only an initiating piece of paper containing a charge (TE p.7).

Very early in petitioner's voir dire examination Mr. Judy, appellant's counsel, in speaking to the prospective jurors in open court stated:

"You all understand an indictment is only a charge, the initiating paper which brings us here today, and that in and of itself the indictment is no evidence, no way. It's merely a document that gets us here to this stage in the proceedings. Do you understand that's not to be considered as evidence? How many of you have sat on a jury before this term?"

Petitioner through counsel has greatly underestimated the intelligence of circuit court jurors.

The fact that the grand jury returned an indictment never has meant to convey to anyone anything other than that it contained a charge which should be considered by the court, the Commonwealth's Attorney and possibly a trial jury. It has never been considered or understood to be evidence. The trial judge very properly refused to give the tendered instruction appearing on the last page of the Transcript of Evidence and listed in petitioner's court of appeals brief as being on page 36.

The trial jurors if they had not prior thereto understood from the time of their voir dire interrogations been informed and understood that the indictment was only a written statement of a charge of which the accused may or may not be guilty and carried neither probative force or implication of guilt whatever. (TE p.1).

Hence, further instructions to the jury would have only belabored the point and it was not necessary that the court supply the trial jury with a written repetitious phillippic thereon. Individuals and often attorneys, particularily those of limited trial experience are prone to underestimate the ability and intelligence of a Kentucky Circuit Court Jury.

In Kentucky it has long been the practice to supply the accused with a copy of the indictment upon arraignment and to have the indictment read in open court by the clerk, judge or Commonwealth Attorney at the beginning of the trial. The procedure is

intended to be purely informative and at no time is it considered as evidence, or, as an instrument of impugnation of the guilt of the indictee, or, as affecting the fairness of the trial of the indictee, or, as a dilution of the presumption of innocence which stays with the accused until he is proven guilty beyond a reasonable doubt.

The case of Estelle v. Williams, 96 S.Ct. 1691,1692, 48 L.Ed. 126 (1976) was discussed in Question I in which its distinguishing and applicable features are discussed at length. The case of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) was a juvenile case and discussed "proof beyond a reasonable doube" and "preponderance of evidence" at some length and held that "juveniles like adults, were constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory stage when the juvenile was charged with an act which would constitute a crime if committed by an adult."

There is nothing in the presumption of innocence instruction argument presented in appellant's case which made it manditory that the instruction presented by him be given by the court. There was no error of constitutional demension.

On Page 2 of the petitioner's petition he states and presents two (2) questions for the court to consider in the instant case. On page 12 of the petitioner's petition he presents for the first time in the following verbiage the following question:

> "The decision below affirming the trial judge's refusal, despite defense objection to instruct the jury on the presumption of innocence conflicts with the decisions of the highest courts of numerous states."

This question has previously been discussed at length herein. Petitioner in an appartent effort to pressure this Court by citing cases from other states, none from Kentucky, lists the following fourteen cases on pages 9 to 11 inclusive of his brief in erroneously alleging that they support his contention: State v. Cokely, W.Va., 226 S.E. 2d 40,43 (1976); Allen v. Commonwealth, Va. 180 S.E. 2d 513,516; Whaley v. Commonwealth, Va. 200 S.E. 2d 556 (1973); People v. Hill, Colo. 512 P.2d 257, 258,259 (1973); Ealey v. State, Ga.App.94 232 S.E. 2d 620,620-621 (1977); State v. Henderson, 81 N.M. 270, 466 P.2d 116,118 (1970); Reynolds v. State, Fla. App. 332 So.2d 27,29 (1976); State v. McHenry, Wash. 558 P.2d 188, 190 (1977); People v. McClintic, Mich. 160 N.M. 461 (1916); People v. Leavitt, 301 N.Y. 113, 92 N.E. 2d 915 (1950); State v. Stoddard, Mont. 412 P.2d 827 (1966); State v. Coleman, Mont. 460 S.W. 2d 719 (1970); Gilleylen v. State, Ala. 272 So.2d 905 (1973) and People v. Dornblut, 24 A.2d 639, 262 NYS 2d 414 (1965).

There are fourteen cases cited from ten different states or one and one-fifth of the total number of states but not one case from the Commonwealth of Kentucky. The law in the different states vary as do court rules, statutory law, case law, the constitutions and criminal practices. Not one of the cases cited control the one now before this court. The facts are different and other facets of the cases distinguish them. Not one of the cases in the trial records stresses the presumption of innocence as often or to the degree to be found in the case sub judice.

The trial judge in the instant case followed the applicable case law of Kentucky which petitioner admits in his brief.

On Page 12 of his brief Petitioner has added a number 3 statement or question in which he states:

> "The decision below affirming the trial judge's refusal, despite defense objection, to instruct the jury on the indictment's lack of evidentiary value conflicts with previous decisions of federal courts of appeal and a prior decision of the Supreme Court."

The affirming of the trial judge's action in refusing the written instruction requested on the indictment's lack of evidentiary value was not in conflict with but consistent with previous decisions of Kentucky's highest court. Previously in the response on pages 7,8,9,10,17 and 18 it has been repeatedly pointed out that the reading of the indictment was for the purpose of informing and enlightening the trial jury of the nature of the charges on which the petitioner was to be heard, tried and his guilt or innocence determined. The heavy burden of proving the petitioner guilty beyond a reasonable doubt rested upon the Commonwealth; that the presumption of innocence had to be overcome by proof.

It was not manditory however, that the two obvious self-serving tendered instructions of the petitioner be given the trial jury by the trial court judge. From the record and evidence transcripts a seven year old child would understand that the indictment was "merely a typed charge on a piece of paper"and not evidence of the petitioner's guilt or innocence. See Baker v. Commonwealth, 134 S.W. 2d 997 at page 999; Johnson v. Commonwealth, 262 S.W. 2d, 263, 297.

The petitioner has not stated a single valid reason for the granting of a writ of certiorari.

CONCLUSION

For the reasons herein set out and others which the record, briefs, judgments and decisions disclose the writ of certiorari to review the questions stated should be denied.

Respectfully submitted,

ROBERT E. STEPHENS
ATTORNEY GENERAL

GUY C. SHEARER
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that the foregoing Response to Petition for Writ of Certiorari has been mailed, postage prepaid, to Honorable J. Vincent Aprile II, Assistant Deputy Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601 this the 9th day of November, 1977.

Assistant Attorney General

Michael TAYLOR, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

April 1, 1977.

Discretionary Review Denied June 29, 1977.

Defendant was convicted before the Franklin Circuit Court, Henry Meigs, J., of second-degree robbery, and he appealed. The Court of Appeals, Howard, J., held that refusal to give defendant's requested instruction on presumption of innocence was not error; that failure to instruct on indictment's lack of evidentiary value did not deny defendant due process; that defendant was not entitled to reversal of conviction on basis of prosecutor's unobjected to references to facts which related to defendant's character; but that failure to make a presentencing investigation before defendant was sentenced and failure to consider probation or conditional discharge was error.

Affirmed in part; reversed in part. Wilhoit, J., dissented and filed opinion.

1. Criminal Law ⇐829(9)

Refusal to give accused's requested instruction on presumption of innocence was not error in prosecution for second-degree robbery, in view of fact that an instruction on reasonable doubt was given. KRS 515.030.

2. Constitutional Law ⇐268(2)

In prosecution for second-degree robbery, failure to instruct on indictment's lack of evidentiary value did not deny accused due process. KRS 515.030.

3. Criminal Law ⇐1037.1(1)

Accused was not entitled to reversal of conviction of second-degree robbery on basis of prosecutor's unobjected to references, during closing argument, to facts which related to accused's character and which had not been placed into evidence, in view of indication that such references did not meet the standard of prejudice of being so apparent and great as to result in a manifest injustice. KRS 515.030.

4. Criminal Law ⇐986

In prosecution for second-degree robbery, failure to make a presentencing investigation before accused was sentenced and failure to consider probation or conditional discharge was error. KRS 515.030, 532.050, 533.010.

J. Vincent Aprile, II, Asst. Public Defender, Frankfort, for appellant.

Guy C. Shearer, Asst. Atty. Gen., Frankfort, for appellee.

Before HAYES, HOWARD and WILHOIT, JJ.

HOWARD, Judge.

Michael Taylor was convicted by a Franklin Circuit Court jury of violating *Ky.Rev. Stat.* Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

[1] Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463 (1926); *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). We find no reason to change the established law on this point.

[2] The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

[3] In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. *Lynch v. Commonwealth*, Ky., 472 S.W.2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in *Ferguson v. Commonwealth*, Ky., 512 S.W.2d 501 (1974) and *Futrell v. Commonwealth*, Ky., 437 S.W.2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

[4] The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of *Brewer v. Commonwealth*, Ky., — S.W.2d — (1977) (24 Ky.Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in *Brewer, supra* stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

HAYES, J., concurs.

WILHOIT, J., dissents.

WILHOIT, Judge, dissenting.

I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, *Evidence* § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Albert THOMPSON et al., Appellants,

v.

KENTUCKY POWER COMPANY, a corporation, Appellee.

Court of Appeals of Kentucky.

April 8, 1977.
Discretionary Review Denied
June 29, 1977.

Appeal was taken from the Lawrence Circuit Court, W. B. Hazelrigg, J., dismissing an attempted appeal to that court from a condemnation judgment entered in the county court. The Court of Appeals, Cooper, J., held that appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but also failed to revive action in name of representative or successor of deceased landowners against whom judgment was taken.

Affirmed.

1. Dismissal and Nonsuit ⇐60(1), 62

Application of rule that a defendant may move for dismissal of an action or of any claim against him for failure of plaintiff to prosecute or to comply with rules or any order of court is a matter that is within discretion of court. CR 41.02.

2. Eminent Domain ⇐257

Strict adherence to procedures set forth in statute for filing an appeal from a judgment authorizing a petitioner to take possession of land or material is required by courts in all condemnation suits. KRS 416.280.

3. Eminent Domain ⇐257

Procedures set forth in statute for taking an appeal from a judgment authorizing a petitioner to take possession of land or material are full and complete and must be followed by landowner. KRS 416.280.

4. Eminent Domain ⇐257

Failure of a landowner to file an appeal bond as required by statute setting forth procedures for taking an appeal from a judgment authorizing a petitioner to take possession of land or material warrants dismissal of appeal. KRS 416.280.

5. Eminent Domain ⇐257

Appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but

COMMONWEALTH OF KENTUCKY

Court of Appeals

MANDATE

ORVILLE TAYLOR

File No. CA-132-77
VS. Opinion Rendered APRIL 1, 1977

Appeal From FRANKLIN

Circuit Court Action No. 10, 7744

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it sees the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

JUNE 29, 1977 - Movant's Discretionary Review denied by the Supreme Court.

A Copy - Attest:

Issued July 11, 1977

JOHN C. SCOTT, CLERK

OPINION RENDERED: April 1, 1977
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

NO. CA-152-MR

MICHAEL TAYLOR — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
CRIMINAL ACTION NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING IN PART; REVERSING IN PART

*** * * * * * * * *** * * * * * * * ***

BEFORE: HAYES, HOWARD, and WILHOIT, Judges.

HOWARD, JUDGE. Michael Taylor was convicted by a Franklin Circuit Court jury of violating Ky. Rev. Stat. Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463 (1926); Swango v. Commonwealth, 291 Ky. 690, 165 S.W. 2d 182 (1942). We find no reason to change the established law on this point.

The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. Lynch v. Commonwealth, Ky., 472 S.W. 2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in Ferguson v. Commonwealth, Ky., 512 S.W. 2d 501 (1974) and Futrell v. Commonwealth, Ky., 437 S.W. 2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegationsare correct. The recent Supreme Court case of Brewer v. Commonwealth, Ky., ____ S.W. 2d ____ (Jan. 14, 1977) (24 Ky. Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in Brewer, supra stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing

procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

Judge Hayes concurring. Judge Wilhoit dissenting.

Attorney for the Appellant:

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Frankfort, KY 40601

Attorney for the Appellee:

Hon. Guy C. Shearer
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Capitol Building
Frankfort, KY 40601

COURT OF APPEALS OF KENTUCKY

CA-152-MR

MICHAEL TAYLOR — APPELLANT

V. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
INDICTMENT NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING

* * * * * *

WILHOIT, JUDGE: I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law

builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, Evidence § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

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John C. Scott
Clerk

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT, KENTUCKY 40601

U.S. 127 Twilight Trail
564-7920

CERTIFICATION

I, Jeanette Trusty, do hereby certify that the foregoing Opinion Affirming in Part and Reversing in Part, rendered April 1, 1977; and Mandate issued July 11, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, are true and correct copies as same appear on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Jeanette Trusty

Jeanette Trusty, Deputy Clerk
Court of Appeals of Kentucky

SUPREME COURT OF KENTUCKY
SC-249-D

MICHAEL TAYLOR — MOVANT

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION TO
SUPPLEMENT RECORD AND ORDER
DENYING DISCRETIONARY REVIEW

The motion of the Commonwealth of Kentucky that it be permitted to supplement the record in this proceeding is denied.

The motion of Michael Taylor for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 29, 1977.

Chief Justice

MARTHA LAYNE COLLINS
CLERK

OFFICE OF THE CLERK
SUPREME COURT OF KENTUCKY
STATE CAPITOL, FRANKFORT, 40601

ROOM 209
(502) 564-4720

I, Martha Layne Collins, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached Order entered by the Court on June 29, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, File No. SC-249-D, is a true and correct copy as it appears on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Martha Layne Collins
Clerk